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No. 88 --

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1987

KERN-TULARE WATER DISTRICT,

Petitioner,

vs.

CITY OF BAKERSFIELD, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENT CITY OF BAKERSFIELD, CALIFORNIA

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QUESTION PRESENTED

The only question presented in this case is whether the California Constitution and statutes evidence a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights.

The "questions presented," as articulated by Petitioner are merely an attempt to draw into question matters which are totally irrelevant in order to avoid the state action issue which must be decided in favor of Respondent City of Bakersfield under all federal case law.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the California Constitution and statutes which are relied on by Respondent City of Bakersfield and not contained in the Appendix to the Petition for Writ of Certiorari are set forth in full in Appendix A to this Brief.

STATEMENT OF THE CASE

The statement of the case set forth in the opinion of the Ninth Circuit Court of Appeals accurately describes the material facts in this case and the proceedings in the district court:

> "The [Respondent] City of Bakersfield (City) is located near the Kern River in Kern County, California. In 1976, it acquired certain Kern River water rights and related facilities. The City financed the acquisition by issuing municipal bonds, representing that future revenues from water contracts with utilities would serve to service the debt. Such a contract was entered into with

the [Petitioner] Kern-Tulare Water District (District). The contract provided for annual payments by the District to the City in the amount of $400,000 in return for 20,000 acre-feet of water per year. The contract provided further that, subject to certain exceptions, the District was prohibited from transfer of water received by the city under the contract without consent of the City.

"The District attempted to sell the bulk of its 1983 entitlement to other districts. The City refused consent. The subject water was never used, however; the water eventually ran into the state aqueduct, and

out of the Kern County water basin. The District filed an amended complaint in the U.S. District Court for the Eastern District of California on September 20, 1984, which alleged that: (1) the City's refusal to consent to the transfer violated § 1 of the Sherman Act, 15 U.S.C. § 1; (2) the City was a monopolist in violation of § 2 of the Sherman Act, 15 U.S.C. § 2; (3) the City breached its contract; and (4) the City violated § 17200 of the California Business and Professions Code, which prohibits unfair competition. The District sought $340,000 in damages.

"Pursuant to Fed.R.Civ.P. 56(d), the City moved on December 21, 1984, for a determination of a material issue relating to the retroactive application of the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (the LGAA). The City argued that the LGAA, which immunizes local governments from damages liability under the antitrust laws for acts undertaken in an official capacity, should be applied retroactively to it. The district court rejected this argument and denied the motion on March 26, 1985. Thereafter, the City moved for abstention or, in the alternative, summary judgment, and for reconsid-

eration of the order denying retroactive application of the LGAA. The district court denied the motions in an opinion set forth at 634 F.Supp. 656 (E.D. Cal.1986). The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b)." (Appendix B to Petition for Writ of Certiorari, App. 31-32.)

The Ninth Circuit Court of Appeals affirmed the district court's refusal to dismiss or abstain, but reversed the district court's determination that the City of Bakersfield was not entitled to immunity from damages liability under the federal antitrust laws.

REASONS FOR DENYING THE WRIT

Rule 17 of the Supreme Court Rules sets forth the the "special and important reasons" which are considered by this Court in determining whether to grant a petition for writ of certiorari. Petitioner Kern-Tulare Water District ("District") makes a strained effort to characterize this case as one which falls within the scope of Rule 17. However, as Respondent City of Bakersfield ("City") will demonstrate herein, there is no basis for review of this case by the Court.

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS COMPLETELY CONSISTENT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND WITH THE DECISIONS OF THIS COURT ON THE ISSUE OF STATE ACTION IMMUNITY FOR MUNICIPALITIES FROM DAMAGES LIABILITY UNDER FEDERAL ANTITRUST LAWS

District does not argue that the decision of the Ninth Circuit in this case is inconsistent with the decision of any other federal court of appeals on the issue of state action immunity for municipalities from damages liability under federal antitrust laws. Nor does District argue that the Ninth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise

of this Court's power of supervision." (Rule 17.1(a) of the Supreme Court Rules.)

Rather, District appears to take issue with a series of Ninth Circuit decisions on state action immunity, claiming that all of those decisions, including the instant case, are inconsistent with this Court's decisions on this issue.

An analysis of the Ninth Circuit's decision in this case demonstrates that it is completely consistent with the legal principles which were enunciated by this Court in its most recent case on state action immunity, Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). It is District who seeks to depart from the Town of Hallie decision and inter-

ject factors into the state action immunity test which were never intended by this Court to be part of that test.

In Town of Hallie, this Court made clear that a municipality is entitled to immunity from antitrust damages where its alleged anticompetitive action was taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the relevant subject matter area. This Court also made clear that the clearly articulated state policy need not specifically identify or compel the anticompetitive conduct. So long as the conduct is a logical result from a broad authority to regulate granted to a city, the "clearly articulated" state policy test has been met. (471 U.S. at 42.)

In the instant case the only alleged anticompetitive action of the City was its refusal to consent to a resale of water by District, action which was expressly permitted under the terms of the contract by and between the City and the District. In order for such action to fall within the state action immunity under Town of Hallie, there must be, at a minimum, a broad grant of authority to the City to regulate water such that the City's refusal to allow a resale of water would be a foreseeable result of exercising such authority.

The opinion of the Ninth Circuit sets forth the relevant provisions of the California Constitition and the California Water Code and Government Code which authorize the City to regulate and control water resources:

"We begin with the state constitution, which provides that water resources are to be put to beneficial use to the fullest extent of which they are capable, and that waste and unreasonable use are to be prevented. Cal. Const., Art. 10, 2. See also Cal. Water Code § 100 (West 1971). The right to water and it [sic] use is limited to that which is reasonably required, and does not extend to waste or unreasonable use. Cal. Const., Art. 10 § 2. The use of all water is subject to the regulation and control of the state, in a manner to be prescribed by law. Cal. Const. Art. 10 § 5. The constitution

declares further that municipal corporations may establish, purchase and operate public works to furnish their inhabitants with water. Cal. Const. Art 11. § 9(a).

* * *

"It is the 'established policy' of California that a city's right to hold or use water 'to the fullest extent necessary for existing and future uses' should be protected to the fullest extent necessary for existing and future uses, subject to reasonable use and the prohibition against waste. Cal. Water Code § 106.5 (West 1971). Cities enjoy the power

to contract for supplying themselves with water for municipal purposes. Cal. Government Code § 38742 (West 1968). Cities are empowered to acquire water, water rights, and related facilities by purchase or by condemnation, in order to supply water for their use and the use of their inhabitants. Cal. Government Code § 38730 (West 1968). Section 382 provides that cities may sell, lease, exchange or transfer surplus water. It is also state policy to facilitate voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import, Cal. Water Code § 109 (West Supp.

1987); the legislature has found that voluntary water transfers between users can result in more efficient use of water. Cal. Water Code § 475 (West Supp. 1987). Cities are subject to the power of the Water Resources Control Board to take action necessary to prevent such unreasonable use or waste. Cal Water Code § 275 (West Supp.1987)." (Appendix B to Petition for Writ of Certiorari, App. 39-40.)

The constitutional and statutory provisions set forth above go far beyond the grant of authority which this Court found sufficient in Town of Hallie to constitute a clearly articulated and affirmatively expressed state policy to

displace competition with regulation. Further, in light of the fact that municipalities are expressly given the power to sell, lease, exchange or transfer surplus water, it cannot be seriously contended that the City's placing conditions on the sale of water, such as its right to refuse to consent to a resale, is not a foreseeable result of empowering the City with such power.

Indeed, a close reading of District's Petition reveals that it is not making such an unfounded contention. Instead, District has focused on a possible consequence of the City's action, namely, that its refusal to allow a resale resulted in wasting water. Although the alleged noncompetitive action of the City in refusing to

consent to a resale of water is action taken pursuant to a clearly articulated state policy. District contends that the City is not immune from liability because that action allegedly resulted in a violation of another state law or policy prohibiting water waste.

The notion that "thwarting" or "violating" state policy will cause a "loss" of the immunity has surfaced in a number of cases and has often been rejected. In Town of Hallie at footnote 7 of its opinion, this Court cautioned lower federal courts against becoming,

> "embroil[ed] . . in the unnecessary interpretation of state statutes. Besides burdening the courts, it would

undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny." (471 U.S. at 44.)

This Court also addressed this issue in another state action immunity case, Hoover v. Ronwin, 466 U.S. 558 (1984), reh. den. 467 U.S. 1268 (1984), wherein plaintiff was an unsuccessful applicant to practice law in Arizona who alleged that the Arizona State Bar had violated the Sherman Act in administering the entrance examinations.

At issue in Hoover was whether the plaintiff could avoid the immunity by suing a private entity, the State Bar, and alleging that the Arizona Supreme Court had abused the state policy

Court had abused the state policy contained in the state constitution by abrogating its duties in favor of that private entity. This Court rejected that argument, explaining that such reasoning:

> ". . . would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the Parker v Brown doctrine."
> (Hoover, at 580.)

A leading case on this issue is Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), cert. den. 471 U.S. 1003 (1985), which follows the view of Hoover. Plaintiff in Scott was the developer of a shopping center to be built on the outskirts of town and compete with a center to be built in a downtown redevelopment area. Defendant city rezoned plaintiff's property to prevent its use as a second shopping center, and he brought suit under the Sherman Act, alleging a conspiracy between the developer and the city council aimed at preventing his competing development.

The Court held that the state action immunity applied to the city because the state's urban renewal laws "clearly authorized Sioux City to zone outlying

areas of the city to protect urban renewal goals." (Scott, at 1212), and went on to explain that even if the city had failed to follow the proper procedures in rezoning, there was no antitrust liability unless procedures had been violated in the "extreme". By this the Court meant that unless the City Council had been bribed or had otherwise acted criminally, it was immune, (Id., at 1215); mere "abuses in the administration of jurisdiction conferred by the State should be left for State tribunals to review." [Quoting from Areeda, Antitrust Law, ¶ 212.3(b) at p. 57 (Supp. 1982).]
(Id., at 1216.)

Once the state law has been analyzed and it has been determined that the action of a city was within the

"contemplation" of the State Legislature, a result easily reached here in light of Town of Hallie, then the local agency should not be stripped of its immunity simply because of an allegation that it has violated state law. If District believes the City has violated the state's policy against wasting water, that matter should be taken before the proper state tribunal for review, the California Water Resources Control Board. (California Water Code, Section 275.)

District also argues that there is a state policy which prohibits municipalities from interfering with, or regulating, water districts such as District. This contention is simply a misstatement of the law. Baldwin Park County Water District v. County of Los

Angeles, 208 Cal.App.2d 87 (1962), cited by District, held that where certain county ordinances purporting to impose requirements relative to supplying water were inconsistent with state law, the county ordinances were invalid under the state preemption doctrine. District also relies on City of Santa Clara v. Von Raesfeld, 3 Cal.3d 239 (1970), in which the court, in dictum, stated that a city regulation on a matter of state wide concern cannot conflict with state law under the preemption doctrine. These cases have no application to the instant case. There is no law in California which prohibits the City from contracting for water with the District and from imposing conditions on the resale of that water.

The Town of Hallie decision enunciates a broad state immunity test to be applied to municipalities. The decision of the Ninth Circuit in holding that the City's action is entitled to state action immunity is a proper application of the Town of Hallie case and is consistent with that case and prior decisions of this Court in all respects.

II.

THE OTHER ISSUES RAISED BY DISTRICT ARE IRRELEVANT AND DO NOT PRESENT A BASIS FOR REVIEW BY THIS COURT

District has raised several other issues which are irrelevant to the issue of state action immunity.

First, District raises the old "proprietary" versus "governmental" distinction in City's activities and argues at length as to the iniquities of the City engaging in business - type activities with immunity from liability for anticompetitive conduct to the distress and dismay of private sector businesses. Although it had ample opportunity to do so, this Court did not

include in the state immunity action test the proprietary-governmental distinction which has so long hampered and confused discussion of local government actions. Indeed, this Court has rejected the notion in its entirety. (Garcia v. City of San Antonio Municipal Transit Authority, 469 U.S. 528 (1985), reh. den. 471 U.S. 1049 (1985).) The outdated distinction is, thus, irrelevant to this case and, therefore, is not a proper basis for review by the Court.

In connection with the governmental-proprietary argument, District also makes two other irrelevant claims. First, District claims that the state action immunity attaches only to regulatory activities as opposed to "marketplace" activity. This argument ignores the fact that the City has

specifically implemented its delegated authority under state law by adopting ordinances under its Municipal Code which create a Water Board with the power to, inter alia, enter into agreements to sell water to others on such terms as will best serve the public interest. Second, District contends that the City should not be allowed the benefit of the state action immunity because it would then be given more power than a foreign sovereign nation. The only response that can be made to this nonsensical and irrelevant argument is that it should have been more properly addressed to this Court in 1985, since the Town of Hallie decision gives the City of Eau Claire, Wisconsin more power to control the sale of its sewage services than a foreign nation. It is respectfully submitted that there

is nothing inherently outrageous in permitting an American municipality more economic freedom in delivering its own services than a foreign sovereign.

Finally, District attempts to create an artificial issue by arguing that the state policy pursuant to which the City derives its power to regulate and control water resources does not grant the City authority over rural markets and surplus water. This argument is an attempt to mislead the Court with the use of antitrust buzz words and concepts which have no relevance in the context of this case. Furthermore, District's argument fails in light of the City's express power to sell or transfer "surplus" water to places outside its boundaries.

CONCLUSION

Based upon the foregoing, City respectfully requests that District's petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A
I

CALIFORNIA CONSTITUTION

Article 10, § 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the

reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained.

Article 10, § 5. The use of all water now appropriated, or that many [sic] hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law.

Article 11, § 9(a). A municipal corporation may establish purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.

II

CALIFORNIA GOVERNMENT CODE

Section 38730. A city may acquire by gift, purchase, or condemnation, water, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes, or other conduits, and all other property and appliances suitable and proper to supply water for the use of the city and its inhabitants.

Section 38742. The legislative body of any city may:

(a) Contract for supplying the city with water for municipal purposes.

(b) Acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes in the city.

(c) Use any portion of the revenues from any water works or water supply or distribution facilities, including but not limited to water works or water supply or distribution facilities acquired or constructed with funds from bonds issued under an act entitled "An act to provide for the formation of districts within municipalities for the acquisition or construction of public improvements, works and public utilities; for the issuance, sale and payment of bonds of

such districts to meet the cost of such improvements; and for the acquisition or construction of such improvements," approved April 20, 1915, the Municipal Improvement District Act of 1927, an act entitled "An act to provide for the formation of districts within municipalities for the acquisition, construction or extension of water works, water systems or water distribution systems; for the issuance, sale and payment of bonds of such districts to meet the cost of such water works, water systems or water distribution systems; and for the acquisition, construction or extension of such water works, water systems or water distribution systems" approved April 26, 1935, or from general obligation bonds of the city, for the payment of principal and interest of any such bonds or any other bonds authorized by vote of electors and issued to acquire or construct any water works or water supply or distribution facilities within the city.

(d) Enter into agreements with, and accept financial or other assistance from, the United States or a federal department or agency, for the acquisition, construction, maintenance, and operation of the city water system and the sale and distribution of water from the system.

III

CALIFORNIA WATER CODE

Section 275. The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.

PROOF OF SERVICE

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of prejury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

Executed on March 29, 1988 at Los Angeles, California.

Barbara Baxter